Filed 11/23/09 P. v. Hernandez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD RAY HERNANDEZ,

Defendant and Appellant.

F055911

(Super. Ct. No. BF106040A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Louis P. Etcheverry, Judge.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Lloyd G. Carter and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found appellant Richard Ray Hernandez guilty of one count of second degree murder (Pen. Code,[1] § 187) and five counts of assault with a firearm (§ 245, subd. (a)(2)), with findings he personally used and discharged a firearm causing great bodily injury or death (§§ 12022.5, subd. (a), 12022.53, subd. (d)). The court sentenced appellant to 15 years to life for the murder in count one, plus 25 years to life for the section 12022.53, subdivision (d) enhancement. On the remaining counts, appellant received a total consecutive term of 29 years four months. At trial, appellant did not dispute he shot and killed the victim of count one but claimed he acted in self-defense. Appellant now argues the court erroneously excluded evidence relevant to self-defense. Appellant also asserts the section 12022.53, subdivision (d) enhancement to count one violates the multiple punishment bar of section 654 and principles of double jeopardy. We affirm.

FACTS

A. Prosecution Case

The shooting in this case took place around 1:00 a.m. on January 31, 2004, at LR's Pizza and Sports Bar in Delano. The prosecution presented evidence that earlier that night, appellant's estranged girlfriend, Monica Gutierrez,[2] went to the bar with Lucy Alvarado and some other friends. Beginning around 9:00 or 10:00 p.m., Gutierrez had several phone conversations with appellant. Appellant said he was at a bar in Bakersfield and sounded drunk. They argued about appellant wanting Gutierrez to go home. At some point, appellant asked Gutierrez where she was and said he was going to come get her.

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1 Further statutory references are to the Penal Code unless otherwise specified.

2 Gutierrez testified that in January 2004, her relationship with appellant, with whom she had a four-year-old daughter, was "rocky." Appellant had recently had a baby with another woman and Gutierrez had talked to appellant about wanting to break up with him.

After midnight, Gutierrez went outside onto the patio in front of the bar. The patio was enclosed by a four-foot brick wall and there were tables where people could sit and have cocktails. Gutierrez was standing and having a cigarette with Alvarado and Chris Williams, when she saw a car drive by. She recognized the car as belonging to appellant's friend Abraham Sanchez. The car turned around and parked across the street. Appellant got out of the car and Gutierrez ran to meet him.

Alvarado testified that when appellant arrived, he was followed across the street by his friends, Abraham and Christian Sanchez. Gutierrez grabbed appellant by the arm and said, "let's go." But appellant moved Gutierrez out of his way and approached Williams, who was standing inside the patio on the other side of the brick wall. According to Alvarado, appellant approached Williams with "an attitude" and "want[ed] to argue with him." Williams' demeanor, on the other hand, was "mellow" and "really cool." Alvarado testified there was "a tension at first" but then Williams said something like, "it is me, Chris, and why you tripping for." Appellant and Williams then shook hands and embraced. Gutierrez similarly testified that Williams greeted appellant in a friendly tone, saying something like, "hey, dog, I know you" or "what's up." Williams then put his arm around appellant's neck like he was hugging him.

Shortly thereafter, appellant started yelling at Williams and the two men got into a loud argument. The security guard, Edwin Quiles, tried to intervene. Quiles testified that appellant and Williams were arguing "regarding a girl." Quiles heard the statements, "I'm not messing with her, I'm not" and "Fuck you, you don't know me." Quiles put his hand on Williams' chest and said, "Chris, come on, let's just go inside and forget about it." With Quiles' hand on his chest, Williams started walking backwards, still facing appellant.

Appellant raised his hand and fired a gun at Williams. Witnesses heard two sets of gunshots, with a brief pause in the middle. One witness thought he heard appellant yell, "Fuck Delano." After appellant fired the gun, appellant and Gutierrez ran to the car and

drove away with Abraham and Christian.[3] Gutierrez asked appellant why he shot Williams. Appellant repeated a few times that he did it for her.

Williams bled to death from multiple gunshot wounds to the abdomen and pelvis. Fifteen nine-millimeter cartridge casings were later recovered, indicating the gun had been fired 15 times.

Five bystanders were wounded when appellant fired his gun at Williams, including Quiles, who was hit in the hand. Concepcion Duran, a customer who was on the patio waiting for his wife to bring him his cigarettes, was hit in the arm. Armando Jimenez, a friend of Williams, who ran out from the bar when he heard the argument and tried to push Williams back inside the bar, was grazed in the finger. Jacob Ozuna and Clemente Montes, two friends who were on the patio, were grazed in the feet as they tried to take cover when the shooting started.

B. The Defense

Appellant testified in his own defense. Around 9:00 or 10:00 p.m. on January 30, 2004, he went to a bar in Bakersfield with Abraham and Christian Sanchez. While at the bar, Gutierrez called him and they had approximately five separate phone conversations.

Around midnight, appellant and his friends left the bar in Bakersfield to drive to Delano to pick up Gutierrez. Abraham was driving. When they got to Delano, they went to LR's Pizza and Sports Bar. Gutierrez was standing on the sidewalk and appellant got out to greet her. Abraham and Christian followed. Appellant also greeted Alvarado and they all talked for a bit.

When they turned to walk back to the car, appellant heard someone yell out from the patio, "you are a bitch." Appellant turned around and asked, "who you talking to." A few people responded to him. Appellant went back to the patio. Appellant did not know or recognize the main person who was talking to him. He knew who Williams was and

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3 For clarity, we use the first names of some witnesses. We intend no disrespect thereby.

Williams was not talking to him at that point. According to appellant, there was a group of five to eight people on the patio confronting him.

Appellant testified the group on the patio threatened him, "They are going to kick my ass and, you know, what am I doing there, and they are -- I hear, I hear gang banging as in Delano, as in Nortenos, the Northerners. They're cursing at me and then I am just cursing back." Appellant testified that Williams was not involved in the confrontation. Appellant heard someone else say "what's up, dog or homie." Appellant responded, "you don't know me." Appellant testified he was "cussing at everybody" and "[i]t was heated argument."

While appellant was arguing with the group on the patio, Williams approached appellant and grabbed his arm. Appellant explained, "I'm not too sure if he was trying to shake my hand or what, but he grabbed my arm." Appellant pulled away. Williams then reached towards appellant with both hands, and put one arm on each of appellant's shoulders. Appellant testified Williams' gesture was "kind of a hug" but added "why would he hug me? I'm not a friend like that to hug."

After Williams tried to hug appellant, appellant pushed away from Williams by pushing on his chest. They then got into a heated argument. Appellant started cursing at Williams and Williams cursed back. Williams put his arm around appellant's neck and pulled appellant towards his chest, which pulled appellant up against the wall. Appellant testified, "At that moment I was kind of scared, panic because I got someone pulling me and I feel I am shaking, I feel fear for my life." Appellant could not see anything because his face was in Williams' chest. He also had trouble breathing because Williams was putting pressure on his throat. Williams held him like that for about 30 seconds.

Appellant tried to pull away but was unable to get loose from Williams. Appellant then pulled out a nine-millimeter, semiautomatic gun and fired it at Williams. The gun emptied. Appellant did not stop to reload it. After he fired the gun, "it was like panic, chaos going on, people yelling, screaming." Appellant tried to walk away. When he

looked back, he saw Gutierrez on the ground. He told her, "come on, let's go." They walked quickly across the street, jumped in Abraham's car, and left. When they got in the car, Gutierrez was screaming and everyone was in shock.

C. Appellant's Offer of Proof

At the beginning of his testimony, appellant testified that he moved to Delano when he was in the fourth or fifth grade and lived there until he was 17 years old. At that time, he moved back to Inglewood, where he was born and currently resided. Defense counsel asked appellant whether, during the time he was living in Delano, he had experienced any "incidents involving … violence with other people." The prosecutor objected on grounds of relevance and vagueness, and the trial court sustained the objection. Defense counsel then attempted to ask whether appellant was "ever attacked by other people in Delano." The prosecutor again objected and the court sustained the objection.

Later, outside the presence of the jury, the parties had the following discussion regarding the court's rulings:

> "THE COURT: …At this time, [defense counsel], you wanted to put something on the record with regards to my sustaining the objection with regards to [appellant] talking about his prior experiences in Delano.
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> "[DEFENSE COUNSEL]: Yes. Thank you, your Honor. Since we -- since part of the defense's case deals with a self-defense claim and part of the self-defense claim is the reasonableness of persons' behavior, and reasonableness is judged based upon what that person knew at that time and that place, I think it is important that his knowledge and his experience with -- well, I will just say with gangs and people in Delano has put him in a -- put him in a state of mind to be on guard against what was -- potentially could happen to him at that time given the people that were there at the bar that night.
>
> "THE COURT: All right. And your response, [prosecutor].
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> "[THE PROSECUTOR]: Your Honor, I think -- I think it would only be relevant if -- to self-defense if it was some specific dealing with the people that were at the bar that night, such as the people that he is saying

came out and was hassling him or Chris Williams. If it was somehow specifically connected to that. But I haven't heard an offer of proof as to that, so that's why I'm objecting.

"THE COURT: Yes, I haven't either. I may be mistaken, but I thought he testified he didn't know who the other people were, but I don't know. But [defense counsel], what is your offer of proof that's going on that night that put these people -- he has testified that a lot of people were arguing with him. [¶] … [¶]

"Do you have an offer of proof? I mean, what is he going to testify? I need -- I can't rule in a vacuum.

"[DEFENSE COUNSEL]: Well, I mean, I think he will testify that he's had experience with these Northerners before, these gang members before, that he has been attacked by these gang members who know him, think he is a Southerner for some reason and that seeing those people that he knows or knows to be gang members by look and appearance and maybe by reputation, he had reason to be leery of what they were going to do.

"THE COURT: All right. And my problem I am having with it is he hasn't indicated that he even knew them. How is he going to know they are gang members? And it is a Super Bowl crowd inside of a bar, as far as I can tell.… I don't think that testimony is relevant based on those offers of proof."

DISCUSSION

I. Exclusion of Evidence

Appellant contends the court abused its discretion by excluding evidence of his prior experiences of being attacked in Delano. He further argues the court's ruling violated his constitutional right to present evidence in his defense. Assuming appellant sufficiently preserved his claims for appellate review, we reject them on the merits.

In arguing the trial court erred in excluding the proffered evidence, appellant relies on *People v. Minifie* (1996) 13 Cal.4th 1055 (*Minifie*). In *Minifie*, the defendant shot the victim, Tino, in the Antlers Bar in Pinole. Although Tino did not know Minifie by sight, Tino knew of him and disliked him because Minifie had killed one of Tino's friends, Jackie Knight. Someone pointed Minifie out to Tino, and the two men approached each

other. Tino, who had a broken foot and was using crutches, determined who Minifie was and that Minifie knew who he was. The two spoke briefly and Tino punched Minifie in the face, knocking him down. Tino's crutches fell, and he reached for them. Minifie pulled a gun from his waist area and fired, hitting Tino in the hand; he also hit a bystander in the leg. (*Id.* at pp. 1060-1061.) Minifie testified that he had killed Jackie Knight but that he was not prosecuted for the incident. He was afraid of "'the whole ... Knight crowd.'" When he saw Tino at the Antlers Bar, Tino looked at him "'like if looks could kill, [appellant would] be dead.'" Minifie attempted to leave the bar, but Tino confronted and punched him. Minifie shot at Tino because he knew from the way Tino was grabbing the crutch that Tino was going to hit him in the head with it. (*Id.* at pp. 1063-1064.)

The trial court did not allow Minifie to introduce evidence that he had received numerous threats on his life from the Knights and their friends, nor did the court allow him to testify that he associated Tino with the Knight crowd and was afraid of Tino. (*Minifie, supra,* 13 Cal.4th at pp. 1061-1063.) Minifie was convicted of two counts of assault with a deadly weapon. The court of appeal reversed, based on the trial court's choice not to allow Minifie to testify about threats made by the Knight crowd and his association of Tino with those threats. The Attorney General petitioned for review. The Supreme Court agreed with the court of appeal and adopted that court's reasoning as its own. (*Id.* at pp. 1064-1065.) Thus, the Supreme Court held that, as with threats made by a victim of an assault, evidence of third party threats is admissible to support a claim of self-defense "if there is also evidence from which the jury [could infer] that the defendant reasonably associated the victim with those threats." (*Id.* at pp. 1060, 1069.) The court also noted that in a homicide case involving a claim of imperfect self-defense, "evidence of third party threats may also be admissible if there is evidence the defendant actually, even if unreasonably, associated the victim with those threats." (*Id.* at p. 1069, citing *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.)

Appellant asserts his offer of proof made clear he "reasonably associated the group confronting him with people in that community who had attacked him in the past" and the jury should have been allowed to consider the excluded evidence in determining whether "appellant's perception of the circumstances was reasonable or unreasonable but honest." We disagree with appellant's reasoning and find *Minifie* inapposite because there was no evidence appellant reasonably associated *the victim* with people that had attacked him in the past. Appellant specifically testified that Williams was not part of the group that was confronting him on the patio nor was Williams participating in the threats the group was making towards him. Appellant testified that he became fearful for his life after Williams grabbed him around the neck and pulled him against the wall. Unable to get away, appellant reached for his gun and fired it at Williams. Appellant confirmed in his testimony that he did not mean to shoot anyone on the patio besides Williams. Given the utter lack of evidence linking Williams to the people that attacked appellant in the past, it does not appear the proffered evidence was relevant to the question of appellant's perception of Williams' actions or the reasonableness of appellant's belief in the need to use a deadly weapon in self-defense. Therefore, the trial court did not abuse its discretion in excluding the evidence as irrelevant.

We also agree with the trial court's implicit assessment that the proffered evidence was not relevant to show appellant reasonably feared the group he claimed confronted him on the patio because there was no *specific* evidence linking that group to the unidentified gang members that attacked appellant in the past described in his offer of proof.

Finally, we reject the claim that by excluding the proffered evidence, the court prevented appellant from presenting a defense and denied him due process. An application of the ordinary rules of evidence generally does not infringe on a defendant's right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

II. Enhancement under section 12022.53, subdivision (d)

Appellant contends the enhancement of 25 years to life imposed on count one, pursuant to section 12022.53, subdivision (d), constitutes multiple punishment prohibited by section 654 and violates principles of double jeopardy. He submits the California Supreme Court misapplied United States Supreme Court precedent. Appellant raises the issue to preserve it for federal review.

Multiple punishments for the same act or omission are prohibited. (§ 654.) Section 654 states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (*Id.*, subd. (a).)

Section 12022.53, subdivision (d), provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) … personally and intentionally discharges a firearm and proximately causes great bodily injury … or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." Murder is a qualifying felony under section 12022.53, subdivision (a)(1).

The Supreme Court held that section 12022.53 enhancements are not subject to the multiple punishment provision of section 654. (*People v. Palacios* (2007) 41 Cal.4th 720, 727-728 (*Palacios*).) Enhancements are not elements of the offense for purposes of the rule prohibiting multiple convictions based on lesser included offenses. (*People v. Sloan* (2007) 42 Cal.4th 110, 123 (*Sloan*); accord, *People v. Izaguirre* (2007) 42 Cal.4th 126, 132-134 (*Izaguirre*).) Firearm related enhancements do not place a defendant in jeopardy for an "'offense'" greater than the murder with which he was charged. (*Izaguirre, supra,* at p. 134.) The language in section 12022.53, subdivision (d), providing for a 25-year-to-life enhancement, "'[*n*]*otwithstanding any other provision of*

law'" demonstrates legislative intent to remove the enhancement from multiple punishment provisions of section 654. (*Palacios, supra*, at p. 728.)

Appellant contends that these decisions are flawed and misapply United States Supreme Court precedent. However, as he concedes, this court is bound by *Sloan*, *Izaguirre* and *Palacios*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, we reject appellant's contention.

DISPOSITION

The judgment is affirmed.

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HILL, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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GOMES, J.